

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	DELIVERED ON
14~03~2019	09~04~2019

CORAM :

THE HONOURABLE **MR. JUSTICE N.SATHISH KUMAR**

S.A.No.878 of 2009

and M.P.No.1 of 2009 and M.P.Nos.1 and 2 of 2014

Sivapragasam ... Appellant/Appellant/2nd Defendant

Versus

1. Minatchiammal

2. Taryarammal @ Jansirany

3. Kousalya ... Respondents 1to3/Respondents 1to3/
Plaintiffs

4. Buvaneswaran

5. Sarasvady

6. Kannambal ... Respondents4to6/Respondents 4to6/
Defendants 1,3 and 4

Second Appeal filed under Section 100 C.P.C. against the judgment and decree of Principal District Judge, Puducherry in A.S.No.11 of 2007 dated 27.10.2006 confirming the Judgment and Decree of Additional Sub-Judge, Puducherry in O.S.No.473 of 2000 dated 27.10.2006.

For Appellant .. Mr.K. Doraisamy
Senior Counsel for
M/s. Kandan Doraisamy

For Respondents .. Mr.T.P.Manoharan
Senior Counsel for
M/s.K.P.Jotheeswaran [for R1toR3]
No appearance [for R5 & R6]

JUDGMENT

Aggrieved over the concurrent findings of the courts below decreeing the suit filed by the Plaintiff for partition and preliminary decree the present Second Appeal came to be filed.

2. The brief facts leading to file this Second Appeal is as follows:

2(a) The Plaintiffs and Defendants are the daughters and sons of one Vaithialinga Chetty. Suit property originally belongs to Vaithialinga Chetty father of the Plaintiffs and Defendants. The Said Vaithialinga Chetty died intestate on 07.03.1989. Despite the request for partition the defendants did not come forward to divide the suit property. Hence the suit.

3. The Second Defendant alone contested the suit. Others remained *exparte*. It is the case of the Second Defendant that his father Vaithialinga Chetty died testate and left the Registered

Will dated 07.3.1989 bequeathing the property in favour of the First Defendant in respect of 'A' and 'B' Schedule properties and with regard to the Second Defendant in respect of 'C' Schedule property. After the death of the Vaithialinga Chetty, Second Defendant inherited 'B' Schedule property and after the death of the mother he become owner of item 2 and 3 in 'C' Schedule property. It is the further contention of the Second Defendant that the Plaintiff and others also aware of the Will dated 07.03.1989 and the suit has been filed in collusion with other Defendants. Hence, prayed for dismissal of the Suit.

4. The trial Court has framed the following issues:

- 1. Whether the 2nd Defendant is the absolute owner of the 'B' Schedule and items 2 and 3 of the 'C' Schedule properties as per the Will dated 07.03.1989?*
- 2. Whether there is no cause of action for this suit?*
- 3. Whether the suit has not been properly valued as alleged by the Defendant?*
- 4. Whether the Plaintiffs and defendants are entitled for 1/7*

share in the suit schedule properties?

5. Whether the Plaintiff is entitled to mesne profits from the date of plaint?

6. Whether the Plaintiff is entitled for a preliminary decree as prayed for?

5. The trial Court also framed the following additional issues:

1. Whether the Plaintiffs' father had executed a Will in favour of the first and second defendants?

2. Whether the Will is genuine, true and valid?

6. Before the trial Court P.W.1 was examined and Exs.A.1 to A.11 were marked. On the side the of Defendants second defendant was examined as D.W.1 and other three witnesses were also examined as D.Ws.2 to 4 and Ex.B.1 to Ex.B.10 were also marked on their side. The trial Court decreed the suit in favour of the Plaintiff. The First Appellate Court also confirmed the findings of the trial court and dismissed the appeal. Both the courts below have disbelieved the Will Ex.B.1 propounded by the

Second Defendant. The decree and judgment of the trial Court was challenged only by the second Defendant. The First Defendant who is also said to be the beneficiary of the Will, has not filed any appeal.

7. At the time of admission the following substantial questions of law were framed by this Court:

a. Whether the Courts below erred in not dismissing the suit on the principle that plaintiff should stand or fall on the strength or otherwise of his own case and he cannot be allowed to turn around and pick holes in the defence of the defendant?

b. Whether the Courts below erred in holding that there cannot be evidence or finding without pleading and in the absence of challenge to the genuineness of the Registered Will in the plaint the Courts cannot reject the Registered Will?

8. The learned senior counsel appearing for the Appellant would contend that the Will is the registered Will. When the legal notice was issued by the plaintiff, the same was replied by the Defendants in Ex.A.5. In the Ex.A.5 reply itself the existence of

the Will was clearly informed to the Plaintiff. However, in the plaint reading there is no whisper whatsoever made against the Will and no challenge made against the Will. According to the learned Senior Counsel the Will is a registered one. The attesting witnesses were already died. Therefore, D.W.3 scribe was examined to prove the Will and D.W.4 Sub-Registrar also spoken about the execution of the Will by the testator. Hence submitted that as long as there is no challenge in the plaint against the Will, when the Will is proved, the courts below ought to have dismissed the suit. Absolutely there is no evidence on record to show that the testator was not having testamentary capacity at the relevant point of time. Hence submitted that the Courts below have erred in dismissing the suit. The registered Will ought to have been accepted by the trial Court as well as the First Appellate Court. Since the registration itself gives *prima facie* presumption for valid execution of the Will and further submitted that mere exclusion of the some of the natural heirs, it cannot be a ground to disbelieve the Will.

9. In support of his submissions the learned senior

counsel relied upon the following judgments:

1. Pentakota Satyanarayana and others v. Pentakota Seetharatnam and others [(2005)8 SCC 67]

"Admission of the executor that he had executed the Will and got it registered, held, could not be easily brushed aside."

2. Kasthuri Bai v. V. Ashokumar [2017 (2) CTC 35]

"Where active participation and execution of the Will by the Propounders/beneficiaries was there, it has been held that that by itself is not sufficient to create any doubt either about the testamentary capacity or the genuineness of the Will."

3. Union of India and others v. Vasavi Cooperative Housing Society Limited and others [(2014) 2 SCC 269]

"In the absence of establishment of its own title, the plaintiff must be non-suited even if title set up by defendants is found against them."

4. Bondar Singh and others v. Nihal Singh and others [(2003) 4 SCC 161]

"Absence of pleadings in written statement on an issue, no evidence can be looked into in relation thereto."

5. Uma Devi Nambiar and Others v. T.C.Sidhan

[(2004) 2 SCC 321]

"Although the propounder of the Will has to remove all suspicious circumstances, but mere exclusion of natural heirs or reduction of their share, held, would not by itself amount to a suspicious circumstances."

6. Sridevi and others v. Jayaraja Shetty and others

[(2005) 2 SCC 784]

"Proof of testamentary capacity and signature of testator sufficient to discharge the onus in absence of any suspicious circumstance."

7. Meenakshiammal v. Chandrasekaran and another

[(2005)1 SCC 280]

"Suspicion must be such as is inherent in transaction itself and not the doubt that may arise from conflict of testimony which becomes apparent on investigation of transaction."

8. Sayed Muhammed Mashur Kunhi Koya Thangal

v. Badagara Jumayath Palli Dharas Committee

and other [(2004) 7 SCC 708]

"Grant of relief dehors the pleadings in the plaint - impermissibility."

9. Lodd Balamukundas v. K.Kothandapani and others

[AIR 1971 Mad 422]

"It is not open to the plaintiff who come to the court with a specific ground of relief to go back on them and abandon the same and seek to claim the same relief on the facts alleged by the defendants."

10. Whereas the learned counsel appearing for the respondents would submit that the original Will has not been produced despite the fact that original Will was deposited in the bank by the First Defendant to get loan at that time. Only certified copy of the Will Ex.B.1 has been filed to avoid comparison of the finger print of Vaithilinga Chetty. According to the learned counsel, the alleged will is created one and the same cannot be relied upon for the simple reason that the testator was suffering from parallatic attack for the last three years. The Will alleged to have been executed between 2.00p.m. and 3.00p.m. On 17.3.1989. But on the same day immediately, after the alleged registration, the testator died. This fact created serious doubt about the execution of the Will. Further, the manner in which the Will was written in 14 pages clearly indicate that the Will has been created and some pages right thumb impression of the testator was obtained. Whereas last two pages left thumb impression was obtained. All these facts create serious doubt

about the alleged execution of the Will. It is the further contention of the learned counsel that all the beneficiaries were actively took part in the execution of the Will. Further, the attestation and execution of the Will has not proved in this case as required under law. The Trial Court as well as the First Appellate court considered the entire aspect and disbelieved the Will. Hence prayed for dismissal of the suit.

11. In support of his contention he relied upon the following judgments:

1. *Bharpur Singh and others [(2009)3 SCC 687]*

"It may be true that the Will was a registered one, but the same by itself would not mean that the statutory requirements of proving the Will need not be complied with."

2. *K. Laxmanan v. Thekkayil Padmini and others [(2009)1 SCC 354]*

"Even where plea of suspicious circumstances is not raised but circumstances give rise to doubt, the propounder must satisfy the conscience of the court by removing such doubt."

3. *Dhannulal and others v. Ganeshram and another* [(2015) 12 SCC 301]

"Execution of document does not mean mechanical act of signing document or getting it signed, but an intelligent appreciation of contents of document and signing it in token of acceptance of those contents."

4. *State of A.P. and Another v. T. Suryachandra Rao* [(2005) 6 SCC 149]

"Suppression of material fact or misrepresentation amounted to fraud."

5. *Mt. Raj Rani v. Rajaram* [AIR 1950 Allahabad 202]

"Rapid deterioration in signatures on Will - Death within five hours of execution, held, testator was not in sound disposing mind."

6. *Vishwanath Agarwal v. Sarla Vishwanath Agarwal* [(2012) 7 SCC 288]

"High Court in a second appeal should not disturb the concurrent findings of fact unless it is shown that the findings recorded by the courts below are perverse."

12. In the light of their submissions I have perused the

Judgments of the courts below and pleadings of the respective parties. The relationship of parties are not in dispute. The Plaintiffs and the Defendants are sisters and brothers. Vaithilinga Chetty is the original owner of the property. Admittedly, said Vaithialinga Chetty died on 07.03.1989. This fact is not in dispute. The suit has been laid for claiming their respective shares in the suit property left by the father of the Plaintiffs and Defendants. The Second Defendant who alone contested the suit has propounded the Will dated 07.03.1989 said to have been executed by his father. His main contention is that in the Will which is marked as Ex.B.1(certified copy) Schedule `A` and `B` properties are bequeathed not only in his favour but also the First Defendant in the suit. According to the Second Defendant the above Will is registered Will.

13. It is curious to note that the First Defendant who said to be the beneficiary has not relied upon the above Will nor propounded the Will. Only the Second Defendant resisted the suit and filed the certified copy of the Will. He offered an explanation at the time of filing of certified copy of the Will, since

the original Will was already deposited in the bank while borrowing loan by the First Defendant, he could not file the original Will. The trial Court has accepted the explanation of the second defendant and allowed certified copy of Ex.B.1 Will to file. It is to be noted that D.W.2, who is the secretary of the co-operative bank, where the alleged loan was borrowed by the first defendant, in his evidence has stated that original Will was already handed over to the First Defendant after discharge of the loan in the year 2002 itself. Therefore, the Second Defendant's contention that original Will could not be filed as it was not available, creates serious doubt as to the manner in which secondary evidence came into existence. No materials are available to show that the Second Defendant has taken any steps to call for the original Will from his brother viz., the First Defendant. Further, it is not the case that he has no proper relationship with the first Defendant at the relevant point of time.

14. Be that as it may. Even the secondary evidence taken as such now it has to be seen whether the propounder has proved the Will in the manner known to law. It is well settled

that initial onus always lie on the propounder to prove not only the execution of the Will but also the Will was executed at the time while the testator was in sound and disposing state of mind. Only the initial onus is discharged, the propounder can rely upon the Will. Now in the above settled position of law when the evidence adduced on the side of the defendant when carefully seen, in the entire chief examination he has nowhere pleaded that the attesting witnesses of the Will are not available or dead. only in the cross examination just in passing remarks he has stated that both the attesting witnesses are died. Except his one word answer in the cross examination there is no other materials available on record to show that the attesting witnesses who said to have signed in the Will are really dead or their presence could not be secured. Further none of the relatives of the attesting witnesses were examined first to prove their death. Law mandates the Will has to be proved in the manner known to law. Section 63(c) of the Indian Succession Act mandates that if a Will to be a valid one, there must be an execution as well as attestation. Both the execution and attestation are distinct acts. Unless both ingredients found in section 63(c) namely execution

and execution are proved in the manner known to law the propounder cannot rely upon such Will. Section 68 of the Indian Evidence Act deals with the proof of execution of document required by law to be attested. Unless one of the attesting witnesses are examined for proving the execution of the Will, such document cannot be used as evidence at all. As discussed above, the death of the attesting witnesses have not been proved by the Second Defendant.

15. Be that as it may. Even assuming that both the attesting witnesses died, now it has to be seen whether the propounder has proved the Will as per law. Section 69 of the Indian evidence Act deals with the proof of the Will where no attesting witness found. If the attesting witnesses dead, atleast the signature of one of the attesting witnesses has to be proved besides the signature of the testator. Section 47 of the Indian Evidence Act deals with the opinion as to handwriting, any person acquainting with the handwriting of the person who written the document. The combined reading of Section 69 and 47 of the Indian Evidence Act make it clear that if the attesting witnesses

are not found or dead, signature of atleast one of the attesting witnesses has to be proved by the person who has acquainted with the signature of such attesting witness besides proving of the signature of the testator independently.

16. Now, in this case the Plaintiff relied upon D.W.3 so called scribe to prove the attestation. D.W.3 evidence when entirely seen, he cannot be called as attesting witness at all. Admittedly, the original Will has not been filed, his evidence clearly indicate that he has not identified the signature of any of the attesting witnesses. He simply stated in his evidence that two attesting witnesses also signed in the document. His entire evidence does not show that he has acquainted with the signature of the attesting witnesses at any point of time. Therefore, merely on his evidence that the attesting witnesses also signed in the document that itself will not amount to proof of proving the Will under Section 69 of the Indian Evidence Act. He never identified the signature of the attesting witnesses. The original Will also not filed before the Court. In view of such evidence, the contention of the learned Senior Counsel that there

was a valid compliance of Section 69 has no legs to stand.

17. Now with regard to the other contention that D.W.4 Sub-Registrar was examined to prove the attestation, such contention of the counsel cannot be countenanced for the simple reason that D.W.4 was not the officer at the relevant point of time to register the document. He simply brought the Register to the Court. Except that he has no knowledge about the execution of the document and registration also. Though the registration gives presumption that all the official acts performed correctly but the same will not dispense with the proof of the Will. The Will has to be proved in the manner known to law. Entire onus lies on the party to prove the Will. Not only execution but also the testamentary capacity of the testator.

18. It is admitted fact that as per the evidence, the Will has been presented and Registered between 2.00p.m.and 3.00 p.m.on 07.03.1989. On the same day the testator died in the evening. It is also admitted evidence of D.W.1 himself that testator was suffered paralytic attack for many years. The

testator voluntarily going to the Registrar Office and dictating the minute details containing 14 pages in the Will as spoken by D.W.3 is highly improbable. In Will the entire 12 pages only right hand thumb impression was obtained and 13th and 14th pages left thumb impression was obtained which has been admitted by the scribe. The Will recitals contain all the minute details about 14 pages. When a person already suffered paralytic attack and his death was also on the same day, just few hours before the alleged registration of the document such person giving a minute details to the scribe and scribe writing the Will is highly doubtful. The same clearly indicate that the testamentary capacity of the executor has also not proved.

19. It is further to be noted that all the beneficiaries have prominently took role in registering the document. The evidence of the parties clearly show that all of them were present in the Register office. Whereas the scribe has totally shown ignorance of presence of others. His evidence show as if the testator himself came to the Register office by engaging rented taxi which itself is the serious suspicious circumstance. The contention of

the learned counsel that no challenge has been made in the plaint with regard to the Will, despite the reply notice, has no relevance at all. When the suspicion attached to the Will is inherent in the very transaction itself irrespective of fact that the Plaintiff has not challenged such will, it is the burden of the propounder to remove such suspicious circumstance. As stated above the testator was suffered paralytic attack and he was taking treatment. He died within few hours after the registration of the Will, the manner in which his both thumb impressions was obtained clearly indicate that he was not in a fit state of mind. That apart, wrong recitals have been incorporated in the Will as if testator hands are shaking at the relevant time, therefore, he could not sign. That itself also found to be false in view of the fact that he was already paralytic attack. Hence, suspicious circumstances is inherent in the very transaction. The propounder has not removed the suspicion attached to the Will and original Will also not placed before the Court. Other beneficiaries have not propounded the Will. All these facts clearly indicated, the Will has not been proved and cannot be admitted in evidence. Therefore I do not find any error in the orders of the Courts below. The substantial

Questions of law are answered against the Appellant and the Second Appeal is dismissed.

20. In the result, Second Appeal is dismissed.
Consequently connected M.Ps. are closed. No costs.

09.04.2019

Index: Yes/No
Internet: Yes
Speaking/Non-speaking order
ggs.

To

1. The Principal District Judge, Puducherry
2. The Additional Sub-Judge, Puducherry

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N. SATHISH KUMAR, J.

ggs.



Pre-delivery Judgment in:
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09.04.2019